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No. 22-3009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EMANUEL MCCRAY, As an)	
Individual Employee and as)	
an Independent Contractor)	
to Amazon Logistics, Inc.;)	
GOD LOVES YOU, INC.,)	
Petitioners,)	<u>ORDER</u>
v.)	(Filed Mar. 4, 2022)
OCCUPATIONAL SAFETY &)	
HEALTH ADMINISTRATION,)	
U.S. DEPARTMENT OF LABOR,)	
Respondent.)	

Before: GIBBONS, STRANCH, and LARSEN, Circuit Judges.

On January 6, 2022, Emanuel McCray filed a petition for review challenging the Vaccination and Testing emergency temporary standard (“ETS”) that was adopted by the Occupational Safety and Health Administration (“OSHA”) to address COVID-19 in the workplace. *See* 86 Fed. Reg. 61,402 (Nov. 5, 2021). “Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order.” Fed. R. App. P. 15(a)(1). In this case, 29 U.S.C. § 660 requires a petition for review of an OSHA order to be filed in the appropriate court of appeals

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within sixty days of issuance of the order. The sixty-day limitation on filing the petition is jurisdictional, and the failure to file a petition precludes review by the court of appeals. *CH2M Hill Cent., Inc. v. Herman*, 131 F.3d 1244, 1245-46 (7th Cir. 1997). McCray's petition for review was due on or before January 4, 2022, but was filed two days late.

Even if the petition for review was timely, it is now moot. On January 26, OSHA withdrew the ETS as an enforceable emergency temporary standard. *See* 87 Fed. Reg. 3928 (Jan. 26, 2022). "If events occur during the case, including during the appeal, that make it 'impossible for the court to grant any effectual relief whatever to a prevailing party,' the appeal must be dismissed as moot." *Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 713 (6th Cir. 2011) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)). Because the ETS is no longer in effect, we cannot grant effectual relief, and the case is moot.

Accordingly, we **DISMISS** the petition for review.

ENTERED BY ORDER
OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

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No. 22-3009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EMANUEL MCCRAY, As an)	
Individual Employee and as)	
an Independent Contractor)	
to Amazon Logistics, Inc.;)	
GOD LOVES YOU, INC.,)	
Petitioners,)	<u>ORDER</u>
v.)	(Filed Mar. 24, 2022)
OCCUPATIONAL SAFETY &)	
HEALTH ADMINISTRATION,)	
U.S. DEPARTMENT OF LABOR,)	
Respondent.)	

Before: GIBBONS, STRANCH, and LARSEN, Circuit Judges.

Emanuel McCray has filed a petition for rehearing of this court's March 4, 2022, order dismissing his petition for review for lack of jurisdiction. McCray correctly points out that we referred to the wrong statute when considering the timeliness of his petition for review. But that error was harmless, because the correct statute, 29 U.S.C. § 655(f), provides for the same 60-day period in which to seek judicial review of an emergency temporary standard. The 60th day after the date on which the emergency temporary standard was filed in the Office of the Federal Register, *i.e.*, November 5,

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2021, was January 4, 2022. McCray's petition was filed two days late.

Therefore, upon careful consideration, this panel concludes that it did not misapprehend or overlook any material point of law or fact when it entered its March 4 order. *See* Fed. R. App. P. 40(a). The petition for review was correctly dismissed as untimely.

The petition for rehearing is **DENIED**.

ENTERED BY ORDER
OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

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NOT RECOMMENDED FOR PUBLICATION

No. 22-3009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: MCP NO. 165,)
OCCUPATIONAL SAFETY AND)
HEALTH ADMINISTRATION RULE)
ON COVID-19 VACCINE AND)
TESTING, 86 FED. REG. 61402)

ORDER

(Filed Feb. 18, 2022)

Before: GIBBONS, STRANCH, and LARSEN, Cir-
cuit Judges.

Several motions remain pending in these proceedings, consolidated pursuant to 28 U.S.C. § 2112(a) before this court. After consolidation, the Government moved to dissolve the stay of OSHA's ETS issued by the 5th Circuit in *BST Holdings, LLC v. Occupational Safety and Health Admin.*, 17 F.4th 604 (5th Cir. 2021), and we granted that motion on December 17, 2021, pursuant to our authority under 28 U.S.C. § 2112(a)(4). *See In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021). On January 13, 2022, the Supreme Court stayed enforcement of the ETS. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661 (2022). On January 26, OSHA withdrew the ETS as an enforceable emergency temporary standard. The Government now

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moves to dismiss the Petitions before this court as moot.

A case becomes moot “when it is impossible for a court to grant any effectual relief.” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted). “If events occur during the case, including during the appeal, that make it ‘impossible for the court to grant any effectual relief whatever to a prevailing party,’ the appeal must be dismissed as moot.” *Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 713 (6th Cir. 2011) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)). Because the ETS’s requirements are no longer in effect as a result of OSHA’s withdrawal, the challenged requirements from which Petitioners seek relief are no longer in effect.

Accordingly, we **GRANT** the Government’s motion (Dkt. Entry 408) and **DISMISS** the case as moot.¹ In doing so, we also **DENY AS MOOT** all outstanding motions pertaining to this case (including, Dkt. Entries

¹ We decline to vacate our prior decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The main concern in that case was leaving a judgment on the books that would have res judicata effect. Thus, *Munsingwear* sought to “clear[] the path for future relitigation of issues between the parties and eliminate a judgment, review of which was prevented through happenstance.” *Id.* at 40. Because our opinion did not constitute a final judgment on the merits and this ETS has been withdrawn, those concerns do not apply here.

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225, 230, 231, 246, 247, 252, 307, 328, 368, 404, and
Case No. 21-4133, Dkt. Entries 3, 68).

ENTERED BY ORDER
OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk
